NOs. 09-35818 & 09-35826

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE #1, an individual, JOHN DOE #2, an individual, and PROTECT MARRIAGE WASHINGTON,

Plaintiffs/Appellees,

v.

SAM REED, in his official capacity as Secretary of State of Washington, BRENDA GALARZA, in her official capacity as Public Records Officer for the Secretary of State of Washington,

Defendants/Appellants,

and

WASHINGTON COALITION FOR OPEN GOVERNMENT,

Intervenors/Appellants.

On Appeal from the United States District Court
District of Washington, at Tacoma
No. C09-5456BHS
The Honorable Benjamin H. Settle
United States District Court Judge

BRIEF OF APPELLEES

James Bopp, Jr.
Sarah E. Troupis*
Scott F. Bieniek*

Bopp, Coleson & Bostrom
1 S. Sixth Street
Terre Haute, IN 47807-3510
(812) 232-2434

Attorneys for Appellees
* Applications for Admission Pending

Corporate Disclosure Statement

Pursuant to Fed. Rule of App. Proc. Rule 26.1, I hereby certify that Plaintiff-Appellees John Doe #1 and John Doe #2 are individuals, and therefore do not have parent corporations. Appellee Protect Marriage Washington is a State Political Committee organized pursuant to Washington Revised Code § 42.17.040, is not a registered corporation, and does not have a parent corporation.

/s/ James Bopp, Jr.
James Bopp, Jr.

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

I. Introduction

On September 10, 2009, the District Court issued a preliminary injunction, preventing the release of the names of 138,000 Washington citizens who signed a referendum petition. In a carefully reasoned opinion, the District Court concluded that referendum petitions are political speech, that the Washington Public Records Act ("PRA") is subject to strict scrutiny, and that the state had failed to meet its burden to demonstrate that the PRA is narrowly tailored to serve a compelling government interest.

Washington's election code is emphatic in keeping the names of those who sign referendum petitions confidential. Public observers, permitted to be present while the Secretary of State canvasses and verifies the signatures, are prohibited from making any record of the names and addresses contained on the referendum petitions. The identity of petition signers are disclosed to a limited number of individuals, for the limited purpose of verifying that a referendum is properly on the ballot.

Contrary to the expressed confidentiality of the elections code, Appellants Sam Reed, Secretary of State of Washington, and Brenda Galarza, Public Records Officer for the Secretary of State of Washington (collectively "the State"), and Intervenor Washington Coalition for Open Government ("WCOG") have asserted that a general statute—the PRA—overrides the expressed confidentiality of the elections code and

requires the public release of referendum petitions. The position of the State and WCOG in this suit is contrary to the longstanding position taken by the State that referendum petitions are equivalent to a secret ballot and should not be publicly disclosed. The State now misguidedly finds themselves caught up in the PRA, when they should be acting to protect the citizens of Washington engaging in protected political speech. The State now argues that the expressed confidentiality of the elections code and the rights of individuals to engage in protected political speech are less important than the rights of individuals seeking to publish the names of petition signers on the internet, for the purpose of encouraging others to harass, intimidate, and chill the speech rights of citizens who exercised their protected right to sign a petition. The District Court properly concluded that the State does not have a compelling interest in the public disclosure of a referendum petition, consistent with the expressed confidentiality of the elections code, and prevented the State from releasing the names of 138,000 Washington citizens.

The State and WCOG now asks this Court to conclude that referendum petitions are not political speech, that the PRA is not subject to strict scrutiny, and for a reversal of the preliminary injunction so that the State may release the names of the 138,000 petition signers. PMW now timely files its brief in opposition and asserts that the District Court properly concluded that PMW was entitled to a preliminary

injunction.

II. Jurisdictional Statement

PMW agrees with the State's Jurisdictional Statement insofar as it applies to Count I of PMW's Verified Complaint. The State also devotes considerable briefing to the second count of PMW's Verified Complaint. Under 28 U.S.C. § 1292(a)(1), this Court does not currently have jurisdiction over this second count, because the District Court's Order of September 10, 2009 did not reach the merits of count two, nor did it issue its preliminary injunction order based upon the second count.[1] On appeal, this court "generally will choose to decide only those matters 'inextricably bound up with' the injunctive relief." *Bernard v. Air Line Pilots Assoc., Int'l, AFL-CIO*, 873 F.2d 213, 215 (9th Cir. 1989). "The curtailed nature of most preliminary injunction proceedings means that the broad issues of the action are not apt to be ripe for review, most obviously as to issues that have not yet been decided by the trial court . . . ." 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3921.1 (2d ed. 2009).

The second count of PMW's Verified Complaint asks the court for injunctive relief based upon a factual inquiry as to whether the release of the names of the

[1] In its preliminary injunction order, the District Court stated "[a]t this time, the Court need not reach the merits of Plaintiffs' second claim for relief." (ER016.) This was the extent of the District Court's analysis of PMW's second count.

Referendum 71 petition signers will subject those signers to a reasonable probability of threats, harassment, and reprisals. The inquiry is fact intensive and the District Court did not enter any findings with respect to those facts. Moreover, the second count is an indepedent, stand-alone challenge that is entirely separable from the first count of PMW's Verified Complaint, and is thus not so "inextricably bound up" with the first count as to justify a review by this Court.[2]

III. Statement of the Issues

I. Whether the District Court properly applied the preliminary injunction standards.

II. Whether the District Court properly concluded that signatures on a referendum petition are political speech, such that the State cannot release the names to the public pursuant to the PRA without demonstrating that the PRA is narrowly tailored to serve a compelling government interest.

IV. Statement of the Case

This case is an appeal of the grant of a preliminary injunction on PMW's challenge of the constitutionality of the Washington Public Records Act as applied

[2]Although PMW does not believe that the second count of their Verified Complaint is properly before the Court at this time, they will address those arguments presented by the State in the event this Court does determine that a review the second count is proper.

to referendum petitions. Specifically, the PRA, which the State argues requires the release of the names of the petition signers to the general public, infringes the right of the individual petitions signers to engage in protected political speech under the First Amendment. Because of this infringement, the PRA, as it is applied to referendum petitions, must be narrowly tailored to serve a compelling government interest.

On July 28, 2009, upon learning of the State's impending release of the names of the petition signers to the general public, PMW brought this suit against the State to prevent the release of the names. At that same time, PMW brought a Motion for Temporary Restraining Order and Preliminary Injunction, asking the Court to prevent the release of the names of the petition signers. On July 29, 2009, the District Court entered a temporary restraining order, preventing the release of the names of the petition signers to the general public, and set a hearing date of September 3, 2009 for PMW's Motion for Preliminary Injunction.

On September 10, 2009, after extensive briefing by the State, PMW, and numerous intervenors, as well as the hearing on PMW's Motion for Preliminary Injunction, the District Court entered an Order granting PMW's Motion for Preliminary Injunction on the first count of their Verified Complaint.

V. Statement of Facts

On Saturday, July 25, 2009, PMW submitted a petition containing over 138,500 signatures to the Secretary of State in an effort to place Referendum 71 on the November ballot. Amidst reports that several groups intended make public records requests for copies of the petitions with the goal of placing them on the internet to allow individuals to harass and intimidate petition signers, and statements from the State that it intended to comply with those requests, PMW filed for a temporary restraining order and a preliminary injunction to prevent their release. On September 10, 2009, the District Court concluded that the PRA violated PMW's First Amendment rights and issued a preliminary injunction prohibiting the State from releasing any copies of referendum petitions pursuant to the PRA.

As needed, further facts will be set out throughout the brief.

VI. Statement of the Standard of Review

The State and WCOG have appealed an order granting PMW a preliminary injunction. A preliminary injunction is reviewed under an abuse of discretion standard. *Freecycle Network, Inc. v. Oey*, 505 F.3d 898, 901 (9th Cir. 2007). The Court asks "only whether the district court employed the appropriate legal standards which govern the issuance of a preliminary injunction, and whether the district court correctly apprehended the law with respect to the underlying issues in litigation." *Cal.*

Pro-Life Council Political Action Comm. v. Scully, 164 F.3d 1189, 1190 (9th Cir. 1999) ("*CPLC PAC*"). The Court does not decide whether the district court correctly applied the facts to those legal principles. *Id*. ("[W]hether or not [the appellate court] would have arrived at a different result if it had applied the law to the facts of the case is irrelevant."); *see also Am. Trucking Ass'ns, Inc. v. Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009) ("Stated differently, '[a]s long as the district court got the law right, it will not be reversed simply because the appellate court would have arrived at a different result if it had applied the law to the facts of the case.' (*quoting Wildwest Inst. v. Bull*, 472 F.3d 587, 590 (9th Cir. 2006).")).

VII. Summary of the Argument

The State and WCOG bear an extremely heavy burden in their attempt to overturn the District Court's order grant of a preliminary injunction. Despite their arguments, the District Court correctly concluded that referendum signatures are protect political speech and, therefore, that the PRA is subject to strict scrutiny. Because the District Court applied the correct underlying law to the correct preliminary injunction standards, this Court should affirm the District Court's preliminary injunction.

VIII.Argument

A. The District Court correctly applied the preliminary injunction standards.

When reviewing the issuance of a preliminary injunction, this Court first determines whether the District Court "employed the appropriate legal standards which govern the issuance of a preliminary injunction." *CPLC PAC*, 164 F.3d at 1190.

The District Court correctly applied the legal standards governing the issuance of a preliminary injunction. The District Court correctly set forth the preliminary injunction standard. (ER008) The District Court then stated its findings that, with respect to the likelihood of success on the merits, PMW was likely to be able to show that the PRA is unconstitutional as applied to the disclosure of referendum petitions(ER015-016), that PMW would suffer irreparable harm in the absence of injunctive relief, (ER016-017), that the balance of equities tipped in favor of PMW, (ER017), and that the public interest was in preventing the release of the names of the petition signers. (ER017.)

The State apparently does not take issue with the District Court's application of the legal standards governing the issuance of a preliminary injunction. Thus, it appears that the State's appeal is directed at the District Court's comprehension of the

law with respect to the underlying issues in litigation. (State's Brief at 15-16.)

B. The District Court correctly concluded that the signing of a referendum petition is protected political speech.

The State asks this Court to overturn the preliminary injunction because it believes the District Court incorrectly concluded that referendum signatures are political speech deserving of further First Amendment analysis. (State's Brief at 15-16.) Specifically, the State suggests that because the District Court treated petition signatures as anonymous political speech, its application of the law was incorrect and the preliminary injunction should be overturned. (*Id.*) In focusing on the District Court's conclusion that referendum signatures are "anonymous political speech," the State ignores significant portions of the District Court's opinion and misses the underlying analysis applicable to cases implicating the First Amendment. (State's Brief at 15.)

In reviewing the District Court's determination that referendum signatures are protected political speech, this Court must ask "whether the district court correctly apprehended the law with respect to the underlying issues in litigation." *CPLC PAC*, 164 F.3d at 1190. Whether this Court would have arrived at a different result is "irrelevant," so long as the District Court applied the proper law to the underlying facts of the case. *Id.*

1. The signing of a referendum petition is protected political speech.

When a litigant challenges a statute on First Amendment grounds, the initial question must always be: Does this activity burden expression that the First Amendment was meant to protect? *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). If the court answers that question in the affirmative, it must then ask what level of review is applicable to the statute. *See Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 206-09 (1999) (Thomas, J., concurring) (discussing the standards of review that the courts apply in First Amendment cases) ("*Buckley II*").

The First Amendment to the United States Constitution states, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.[3] The freedoms of speech and association protected by the First Amendment have their "fullest and most urgent application precisely to the conduct of campaigns for political office," *Buckley v. Valeo*, 424 U.S. 1, 15 (1976) (citation omitted), and the protections undoubtedly apply in the context of both candidate and referendum elections. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 295 (1981) (citation omitted). In the context of a referendum petition, the application of the First Amendment's protection of political speech is especially important because it ensures

[3] The First Amendment is applicable to the states through the Fourteenth Amendment. *Stromberg v. California*, 283 U.S. 359, 368 (1931).

that a collection of individuals "can make their views known, when, individually, their voices would be faint or lost." *Id*. at 294.

The Supreme Court has also explicitly stated that "petition circulation is 'core political speech.'" (ER011) (*citing Buckley II*, 525 U.S. at 187); *see also Meyer v. Grant*, 486 U.S. 414, 421 (1988) (noting "the circulation of an initiative petition . . . involves both the expression of a desire for political change and a discussion of the merits of the proposed change"); *Clean-Up '84 v. Heinrich*, 759 F.2d 1511, 1513 (11th Cir. 1985) (holding that the circulation of a petition is protected speech); *see also Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth,* 556 F.3d 1021, 1030-31 (9th Cir. 2009) (treating compelled disclosure statute as protected speech); *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1101 (9th Cir. 2003) (same) ("*CPLC I*"). Further, the District Court noted that it does not appear that any court has directly addressed the question as to whether the "referral of a referendum is likely protected political speech." (ER011). Counsel have since uncovered one unreported case where the court explicitly ruled that "signing a petition . . . constitutes speech requiring further First Amendment analysis." *Hegarty v. Tortolano*, No. Civ.A. 04-11668-RWZ, 2006 WL 721543, *2 (D. Mass. Mar. 17, 2006).

The District Court also properly rejected an argument raised by the State that

referendum signatures are not "core political speech." In other words, the State argues that the signatories to the referendum petition somehow waived their First Amendment rights to engage in protected political speech by signing the petition. (ER010; *see also* State's Brief at 20.) In particular, the State argues that because the signatories disclosed their identities to a limited number of individuals, such as those responsible for circulating the petition and to the Secretary of State, they cannot seek the protection of the First Amendment, because they are no longer anonymous. (State's Brief at 16-20.) As discussed above, this is incorrect. Referendum signatures are protected political speech, and deserve further First Amendment analysis when the State seeks to compel their disclosure to the general public; a citizen does not waive his or her First Amendment rights by signing a referendum petition.

2. The District Court did not limit its opinion on protected political speech to anonymous political speech.

Though the State attempts to frame the District Court's entire decision as to whether the petitions signers are engaged in political speech as a decision on whether the petition signers were engaged in "anonymous political speech," the District Court's opinion was far broader in its review of political speech than the State suggests, and even if the District Court had based its opinion solely on an analysis of anonymous political speech, it could not have altered the ultimate decision of the

District Court.

Though the District Court initially engaged in an analysis of anonymous political speech, it ultimately concluded that it "must determine whether it is likely that referendum petitions that were submitted to the Secretary of State should be considered protected political speech," rather than purely anonymous speech. (ER010.) To that end, the District Court determined that both the Washington and U.S. Supreme Courts have determined that initiative processes fall within the protection of political speech, (ER010), and, though it had no authority directly on point, that the weight of authority "counsels toward finding that supporting the referral of a referendum is likely protected political speech." (ER011.) Ultimately, as to whether the speech at issue here is protected political speech, the District Court stated, "the Court finds that Plaintiffs have established that it is likely that supporting the referral of a referendum is protected political speech, which includes the component of the right to speak anonymously." (ER012.) That protected political speech includes the right to speak anonymously is merely a component of the pertinent holding of the District Court: that signing a referendum petition is protected political speech.

Moreover, even if this Court was to determine that the District Court incorrectly based its finding that the speech was subject to strict scrutiny solely

because it was anonymous political speech, this determination is immaterial. If one separates protected political speech entirely from anonymous political speech, this Court would apply a strict scrutiny analysis to both protected political speech and anonymous political speech. *See McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 347 (1995) (applying exacting/strict scrutiny analysis to compelled disclosure of anonymous political speech). Therefore, even if the District Court's decision was based entirely on a finding that this was anonymous political speech, the Court's review would require determination of whether the release of the names of the petition signers was narrowly tailored to serve a compelling governmental interest. Thus, this would be a harmless error on the part of the District Court, unless the statute had not met strict scrutiny.

3. The State treats petition signatures as protected political speech.

The Washington elections code contemplates that the names of those who sign referendum petitions should remain confidential. While the Secretary of State is granted the authority to canvass and verify the signatures, the elections code specifically prohibits any observer of the verification process from making any record of the names and addresses of petition signers. RCW § 29A.72.230 (observers of the signature verification process may "make no record of the names, addresses, or other information on the petitions . . . .") If any Washington citizen is dissatisfied

with the verification process, he or she need not see the signatures to have the verification process appealed to the Court system; he or she must only express his or her dissatisfaction and the appeal is taken. RCW § 29A.72.240 ("Any citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters may . . . apply to the superior court of Thurston County for a citation requiring the secretary of state to submit the petition to said court for examination . . . .") The names of those who sign a petition in Washington are divulged to a limited number of people, for a very limited purpose—to verify that a referendum petition is properly on the ballot. Within this limited disclosure, the State has taken affirmative steps through the election code to keep the names of the petition signers confidential.

Moreover, Washington has long treated petition signatures as confidential information, and the signatures are only collected and viewed as necessary to ensure that ballot measures are properly put to a vote. "It is the public policy of this state that we uphold the secret ballot in every particular, and these petitions are, more or less, in effect a vote of those who sign the petitions requesting that certain statutes be passed and made the law of the state. This being a fact, we are of the opinion that these petitions are not public records and your office should refuse to permit them to be inspected and copied." Wash. Op. Att'y Gen. 378 (1938). The attorney general

affirmed this position in 1956. Wash. Op. Att'y Gen. 55-57 No. 274 (1956). Even after the Public Records Act was enacted on January 1, 1973, the Secretary of State maintained that the names of petition signers were not subject to release. *See* A. Ludlow Kramer, Letter to State Senator Hubert F. Donohue, July 13, 1973; *see also* A. Ludlow Kramer, Official Statement, July 13, 1973 ("I consider the signing of an initiative or referendum petition a form of voting by the people. Furthermore, the release of these signatures [has] no legal value, but could have deep political ramifications to those signing. I will not violate the public trust").

Contrary to the expressed confidentiality of the elections code and Washington's longstanding and expressed policy of treating petitions signatures as confidential, the State now asserts that a general statute—the PRA—overrides this expressed confidentiality of the elections code, and requires the release of the names of the petition signers. This position ignores the purpose of the PRA, which is to provide transparency of *government* actions, not to provide information on the actions of private citizens engaged in protected political speech. However, the State misguidedly finds themselves caught up in the PRA, when they should be acting to protect the interests of the citizens of the Washington in engaging in protected

political speech as expressed in the elections code.[4]

As a result of their position, the State must assert that the expressed confidentiality of the elections code and the rights of individuals to engage in protected political speech are less important than the rights of individuals seeking to publish the names of petition signers on the internet to encourage others to harass and intimidate these petition signers. That the release of the names to the requesters will result in this harassment, intimidation, and chill is well-known to the State—at least two groups have indicated that the only reason that they wish to obtain the names of the petition signers is to publish them on the internet with the express purpose of encouraging people to have "uncomfortable" conversations with the petition signers. (*See* ER105; ER 471.) The District Court recognized that the State has no compelling interest in releasing the names of the petition signers, and thus prevented the release of the names.

C. The District Court correctly concluded that the Public Records Act is subject to strict scrutiny.

After correctly determining that referendum signatures are protected First

---

[4] At least one state has statutorily chosen to prevent the compelled disclosure of the names of petition signers. In California, referendum signatures are kept private, as "a signer has the right to the privacy of his decision, secure in the knowledge that the fact of his signing will not be used for any purpose beyond the minimum necessary to forward the initiative process." *Bilofsky v. Deukmejian*, 177 Cal.Rptr.3d 621, 626 (Cal. Ct. App. 1981); *see also* Cal. Gov't Code § 6253.5.

Amendment expression, the District Court correctly turned to the question as to the appropriate level of review to use in analyzing PMW's as applied challenge to the release of the petition signers under the Washington Public Records Act.[5] Like its decision as to whether this is protected political speech, the District Court's decision as to whether the disclosure of the names of the petition signers pursuant to the PRA is subject to strict scrutiny is limited to determining "whether the district court correctly apprehended the law with respect to the underlying issues in litigation." *CPLC PAC*, 164 F.3d at 1190. Whether this Court would have arrived at a different result is "irrelevant," so long as the District Court applied the proper law to the underlying facts of the case. *Id*.

The District Court properly noted that, in regulating this sort of protected speech, "the government may infringe on an individual's right to free speech but only to the extent that such infringement is narrowly tailored to achieve a compelling governmental interest." (ER012 (*citing McIntyre*, 514 U.S. at 346-47.) Put simply, the District Court determined that the release of the signatures through the PRA

[5]The State makes an error throughout its briefing as to what speech PMW argues is "compelled." PMW is not arguing that the State compels anyone to sign a petition, but instead, that the State compels a petition signer to *publicly* disclose that he or she has signed a petition. The argument is identical to the legion of campaign finance cases analyzed under the First Amendment where the issue is not whether the state compels any individual to make a contribution, but instead, that the state compels the individual to disclose that fact publicly as part of a contribution report.

should be subject to strict scrutiny.[6]

The District Court's reasoning is consistent with that of the Supreme Court, which has held that when a law restricts "core political speech" or "imposes 'severe burdens' on speech or association," the law must be narrowly tailored to serve a compelling government interest (*i.e.*, the law is subject to exacting/strict scrutiny). *See Buckley II*, 525 U.S. at 206-09 (Thomas, J., concurring) (laws implicating "core political speech" or that impose substantial burdens on First Amendment rights are always subject to strict scrutiny); *Buckley*, 424 U.S. at 64 ("[C]ompelled disclosure cannot be justified by a mere showing of some legitimate government interest. . . . [It] must survive exacting scrutiny. . . . [T]here must be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed.").

A potentially problematic issue here involving the proper level of scrutiny was deftly handled by the District Court. Courts have used two terms ("exacting scrutiny" and "strict scrutiny") to label the level of scrutiny to be applied here. "Exacting scrutiny," as used in *Buckley*, is "strict scrutiny." *Buckley* required "exacting scrutiny"

---

[6] Under *NAACP v. Alabama*, 357 U.S. 449, 463 (1958), strict scrutiny is required "even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure."

of compelled disclosure provisions, *id.* at 64, which it referred to as the "strict test," *id.* at 66, and by which it meant "strict scrutiny." *See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, n.7 (2007) (*Buckley*'s use of "exacting scrutiny," 424 U.S. at 44, was "strict scrutiny")("*WRTL II*"); *see also McIntyre*, 514 U.S. at 347 (*citing Bellotti*, 435 U.S. at 786) (equating "exacting" scrutiny with "strict" scrutiny).[7] The District Court recognized that courts have used two terms for the level of scrutiny applied in this situation, but determined that the two levels of scrutiny were equivalent before proceeding to apply strict scrutiny. (ER012, n. 6.)

Under strict scrutiny, Washington "bears the burden of proving that the [Public Records Act] provisions at issue are '(1) narrowly tailored, to serve (2) a compelling state interest.'" *Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172, 1178 (9th Cir. 2007) (*citing Republican Party of Minnesota v. White*, 536 U.S. 765, 774-75

---

[7] In *Canyon Ferry*, this Court declined to clarify whether strict scrutiny applies in the context of ballot measure disclosure. 556 F.3d at 1031 (striking Montana's disclosure statute under any standard of review). *See also Cal. Pro-Life Council, Inc. v. Randolph*, 507 F.3d 1172 (9th Cir. 2007) (applying strict scrutiny); *Alaska Right to Life Comm. v. Miles*, 441 F.3d 773, 787-88 (9th Cir. 2006) (assuming without deciding that strict scrutiny applies); and *Am. Civil Liberties Union of Nev. v. Heller*, 378 F.3d 979, 992-93 (9th Cir. 2004) (applying strict scrutiny).

However, regardless of whether this Court accepts that "exacting scrutiny" is always the same as "strict scrutiny," strict scrutiny must apply to the Public Record Act's disclosure provisions because compelled disclosure provisions constitute substantial First Amendment burdens. *Davis v. FEC*, ___ U.S. ___, 128 S. Ct. 2759, 2774-75 (2008). Further, this is not the stage of the case to address this issue.

(2002) ("*CPLC II*"). On this appeal of the preliminary injunction, the District Court's conclusion that the State has failed to meet its burden under a strict scrutiny analysis is entitled to deference by this Court, even if this Court, in applying strict scrutiny, would have found that the PRA as applied to referendum petitions is narrowly tailored to a compelling interest of the State. *See CPLC PAC*, 164 F.3d at 1190.

Accordingly, the District Court correctly determined that the release of the names of the petition signers pursuant to the PRA is likely unconstitutional, because it is not narrowly tailored to serve a compelling government interest in the District Court, and this Court should defer to the District Court's determination that a preliminary injunction preventing the release of the names is warranted.

D. The Public Records Act is not narrowly tailored to address a compelling government interest.

The District Court properly applied the preliminary injunction standards, determined that referendum signatures are political speech, and subjected the PRA to strict scrutiny review, and this Court's inquiry as to the issuance of the preliminary injunction should end here. The decision as to whether the PRA is narrowly tailored to address a compelling government interest is a determination best left to the District Court, and this Court must uphold the District Court's decision even if this Court "would have arrived at a different result" as to whether there is a compelling

government interest to which the statute has been narrowly tailored. *Am. Trucking Ass'ns, Inc.*, 559 F.3d at 1052 (quotation omitted).

Although both the State and WCOG spend significant time discussing what compelling government interest the State may have in releasing the names of the petition signers to the general public, this is not an inquiry this Court needs to make at this time. However, even such an inquiry shows that neither the State nor WCOG have presented a compelling government interest in releasing the names of the petition signers pursuant to a narrowly tailored law.

1. Strict scrutiny requires the Public Records Act to be narrowly tailored to serve a compelling government interest.

To survive strict scrutiny analysis, a law or regulation must be narrowly tailored to further a compelling government interest. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989). The State bears the burden of proving that any interest is presents is compelling, and then proving that the public disclosure of referendum petitions is narrowly tailored to serve that interest. *See CPLC II*, 507 F.3d at 1178. A law can fail to be narrowly tailored in one of several ways. It may be over-inclusive if it restricts speech that does not implicate the government's compelling interest in the statute. *Simon & Schuster v. New York State Crime Victims Bd.*, 502 U.S. 105, 121 (1991). The regulation may also be under-

inclusive if it fails to restrict speech that does implicate the government's interest. *See*, *e.g.*, *Republican Party of Minn.*, 536 U.S. at 779-80. Finally, a regulation is not narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990).

2. The interests presented by the State and WCOG are not the sort of "compelling government interests" previously identified as sufficient to justify infringing on First Amendment rights.

In *Buckley*, the Supreme Court stated that "disclosure requirements, as a general matter, directly serve [three] substantial governmental interests." 424 U.S. at 68. "First, disclosure provides the electorate with information as to where political campaign money comes from and how it is spent by the candidate in order to aid the voters in evaluating those who seek federal office [("Informational Interest")]. . . . Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity [("Corruption Interest")]. . . . Third, . . . recordkeeping, reporting, and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limits [("Enforcement Interest")]." *Id.* at 66-68.

Subsequent courts have clarified that the Corruption and Enforcement Interests are unique to candidate elections, and therefore cannot be relied upon to justify compelled referendum disclosure. *See Bellotti*, 435 U.S. at 789-90; *CPLC I,* 328 F.3d

at 1105 n.23; *see also Canyon Ferry*, 556 F.3d at 1031-32.

This Court recently clarified that the Informational Interest carries with it a significant limitation—it is limited to identifying those "persons *financially* supporting or opposing a . . . ballot measure." *Canyon Ferry*, 556 F.3d at 1032 (emphasis in original). Importantly, this Court added, "the disclosure requirements are not designed to advise the public generally what groups may be in favor of, or opposed to, a particular candidate or ballot issue; they are designed to inform the public what groups have demonstrated an interest in the passage or defeat of a candidate or ballot issue by their *contributions* or *expenditures* directed to that result."[8] *Id.* at 1032-33 (emphasis in original). This Court went on to hold that this limited informational interest is not absolute. *Id.* at 1033-34 (striking a *de minimis* reporting requirement because the marginal informational gain that resulted did not justify the substantial burden resulting from compelled public disclosure). The District Court correctly noted that "the Court nor the parties have the ability to

[8] WCOG spends a significant amount of time explaining how the names of individuals signing a petition might convey useful information to voters. (WCOG Brief at 32-36.) While many pieces of information may influence an individuals vote, this Court has only recognized financial contributions as sufficient to overcome the First Amendment burdens that result from compelled public disclosure. WCOG's argument, carried to its logical conclusion, would allow the State to force every citizen to disclose how he intends to vote before the election, because such information would provide voters with an insight as to the referendum measure itself.

identify whether an individual who supports referral of a referendum to the next ensuing general election actually supports the content of the referendum or whether that individual simply agrees that the referendum should be placed before the voting public." (ER015.) In other words, an individual's signature on a referendum petition simply does not serve the "informational interest" defined by this Court.

In *Buckley II*, the Supreme Court also considered and rejected administrative efficiency and fraud detection as potential state interests justifying compelled public disclosure. *Buckley II*, 525 U.S. at 192. Even if fraud detection were a legitimate interest, it is not compelling with respect to referendum petitions. First, the Supreme Court has recognized that fraud is much less of a concern at the petition process stage. *Meyer*, 486 U.S. at 427-28. This flows from the very justification of the petition process: ensuring that there is a sufficient level of public support to warrant the expenditure of public and private funds to place the referendum on the ballot. The question is not whether Referendum 71 should or should not be enacted, but merely whether Washington citizens as a whole should have the opportunity to voice their opinion on Referendum 71.

Second, in *Washington Initiatives Now v. Rippie*, 213 F.3d 1132, 1139 (9th Cir. 2000), this Court noted that fraud prosecutions during the petition process have been sparse (twice in seven years) and that the fraud was detected by traditional methods

of detecting and prosecuting forgeries (i.e., signature comparison). *See also id.* at 1138 (noting that it is "precisely the risk that people will refrain from advocating controversial positions that makes a disclosure scheme of this kind especially pernicious"). Thus, the State's interest is in government disclosure (i.e., disclosure to the government) to prevent fraud in the petition process.[9] Public disclosure of a petition is not narrowly tailored to advance the fraud interest and is therefore unconstitutional under the First Amendment.

---

[9]An important distinction needs to be drawn in this case between disclosure of donor information and *public* disclosure of donor information. There is no dispute that compelled disclosure represents a burden on First Amendment rights. *See Davis*, 128 S. Ct. at 2774-75; *Buckley*, 424 U.S. at 64. However, in prior cases discussing compelled disclosure provisions, there has been a failure—or lack of need—to address the difference between compelled "private" disclosure (i.e., disclosure made only to the government) and compelled "public" disclosure (i.e., disclosure made available to the public).

Strict scrutiny requires that each application of a statute restricting speech must be supported by a compelling government interest. *WRTL II*, 127 S. Ct. at 2672. *See also Heller*, 378 F.3d at 991 ("[I]t is not just *that* a speaker's identity is revealed, but how and when that identity is revealed, that matters in a First Amendment analysis of a state's regulation of political speech.") (emphasis in original) Thus, in applying strict scrutiny to the provisions of the PRA challenged herein, the Court must be cognizant of the fact that private and public reporting provisions impact First Amendment rights in slightly different ways. A compelled disclosure system that requires only private reporting may be constitutional in a situation where public reporting may not, and, to that end, PMW only challenges Washington's statutes insofar as they require the public disclosure of the names of the petition signers.

3. The Washington Public Records Act is not narrowly tailored to serve the interests presented by the State and WCOG.

At the District Court, the State only presented two potential compelling interests—first, that the state has a compelling government interest in preserving the integrity of the election process, and second, that the electorate is entitled to know who is lobbying for their vote. The District Court extensively discussed both of these interests, and determined that "it is likely that the Public Records Act is not narrowly tailored to achieve the compelling governmental interest of preserving the integrity of the referendum process" and that "the identity of the person who supports the referral of a referendum is irrelevant to the voter as the voting public must consider the content of the referendum and be entitled to a process by which it can ensure that the petitions are free from fraud." (ER015.)

On appeal, the State now reiterates its interests in "determining whether there is sufficient support for a referendum measure to qualify it to the ballot" by "protecting the authority of its citizens to oversee government decision-making with respect to qualification of referendums on the ballot," (i.e., a fraud interest), and "affording citizens the opportunity to know who supports sending referendum measures to the ballot." (State's Brief at 24-26.) The District Court examined and dispatched with each of these arguments, and this Court's deference to the District

Court should not require a re-examination of these findings. Like the State, WCOG argues that the State has an interest in preventing fraud, but expands that interest with a new argument that the revelation of the names of the signatures helps the citizens of Washington to determine the special interest groups and citizens who are interested in the petition. (WCOG Brief at 28-33.)[10]

a. To the extent it exists, the fraud interest of the State is served by a more narrowly tailored means.

With the fraud interest, the State is adequately served through a less restrictive means—limited government disclosure to allow for signature verification. Moreover, to the extent it exists, the State's concerns about fraud appear to be overblown. *See Washington Initiatives Now*, 213 F.3d at 1139 (noting that fraud prosecutions during the petition process have been sparse). Furthermore, the Supreme Court has recognized that fraud is much less of a concern during the petition process. *See Meyer*, 486 U.S. at 427-28. However, even if the State could present evidence that its interest in combating fraud is compelling, the public disclosure of referendum

[10]WCOG also argues that there is an informational interest "in requiring those who expressly advocate the defeat or passage of a ballot measure to disclose their expenditures and contributions." (WCOG Brief at 33.) However, WCOG fails to note this Court's recent decision in *Canyon Ferry*, which stated that any informational interest that might exist here would only be a financial interest, and that it does not apply when that financial expenditure or contribution is *de minimis* in nature. 556 F.3d at 1034. That a petition signature is not a financial interest makes the informational interest cited by WCOG inapplicable here.

petitions is not narrowly tailored to serve that interest.

Pursuant to Washington law, the Secretary of State, and only the Secretary, is granted the authority to verify and canvass the names of the legal voters on the petition.[11] RCW § 29A.72.230. Given the State's interest in ensuring that a sufficient number of legal voters support the referendum, this is an example of a narrowly tailored statute designed to serve a compelling state interest.

In a vacuum, the State's argument that they need the citizens to aid in fraud detection sounds plausible. However, the facts suggest that the public does not have an interest in assisting the State in the signature verification process.

First, only the Secretary of State, is given the power to conduct the signature verification process, and the election code provides for no specific mechanism allowing individual citizens to challenge individual signatures on the referendum petition.[12] RCW § 29A.72.230. Absent procedures to allow for individuals to bring forth challenges to signatures and appropriate deadlines, the assertion that individuals will be providing a check on fraud rings hollow. The integrity of the election process

---

[11]This verification is subject to review by the Court, although, as set forth at VIII.B.3, *supra*, this judicial review does not require nor contemplate that the signatures will be viewed by the general public.

[12]Washington does provide a general mechanism for challenging elections. *See* RCW § 29A.68.011 *et seq.*

is protected by the Secretary of State, who is responsible for verifying the signatures, and by the observers permitted to be present during the verification process, who can ensure that the Secretary of State is observing proper procedures in the signature verification process, as well as subsequent judicial review.

Second, the fact that the disclosure occurs through the PRA and not through a provision of the elections code itself is illustrative of the rather tenuous argument raised by the State. If the goal is to allow for public assistance in the signature verification process, one would expect the disclosure provision to be mandatory, contained within the elections code itself, and to provide for procedures for submitting contested names.

Third, no one has requested copies of referendum petitions in recent years, but the State notes that petitions for initiative measures are routinely the subject of public records requests. (ER079-080 ¶¶10-11.) Despite this, the State has failed to cite a single instance where the public disclosure of the initiative petition resulted in the detection of a fraudulent signature.[13] The State has failed to carry its burden of

[13]The State's fraud interest cannot detecting and prosecuting instances of fraud, which is an example of the "prophylaxis-upon-prophylaxis approach" rejected in *WRTL II*, 551 U.S. at 478-79. In order for the proffered fraud interest to be compelling, it must result in widespread detection of fraudulent signatures. The detection of a few bad signatures, unlikely to effect whether the referendum qualifies, is insufficient to overcome the burdens on the First Amendment rights that occur when the names of 138,000 petition signers are released to the general public.

offering evidence that the statute is supported by a compelling government interest, and that its chosen remedy, the public disclosure of referendum petitions, is narrowly tailored to address that interest in a direct and material way.

b. The interest of voters in knowing who signed a petition is not a compelling government interest.

As to the interest of voters in knowing who has signed a petition, this Court has specifically rejected this interest as viable in a recent decision where it ruled that, in the context of ballot measure campaigns, a state cannot compel the disclosure of the names of those people who have made *de minimis* contributions to a campaign. *See Canyon Ferry*, 556 F.3d at 1034. Signatories to a petition are like *de minimis* contributors and the state cannot compel their disclosure under the First Amendment. *Id.*; *see also id.* at 1036 (Noonan, J., concurring) ("How do the names of small contributors affect anyone else's vote? Does any voter exclaim, 'Hank Jones gave $76 to this cause. I must be against it!'"). Likewise, one could ask, "How do the names of petition signers affect anyone else's vote? Does any voter exclaim, 'Hank Jones signed the petition. I must be against it!'" Moreover, the State's position requires the illogical conclusion that Washington citizens are more interested in knowing who merely signs a petition than they are in knowing those citizens who make financial

contributions to a campaign.[14] WCOG's concern with special interest groups is

---

[14]Similarly, WCOG argues that the release of the names of the petition signers will help citizens "understand who the backers of the petition are, whether they are State officials or influential citizens in the State of Washington, and where generally the support for the referendum is coming from." (WCOG Brief at 32.) In addition to being unrecognized as an interest by any court in analyzing compelled disclosure provisions subject to strict scrutiny, this Court's *Canyon Ferry* decision holding that there isn't even sufficient interest to compel the release of those who financially support a measure at a *de minimis* level prevents this from being a compelling governmental interest. 556 F.3d at 1034.

Such a requirement would also be underinclusive, because it does not compel those who oppose an initiative petition to identify themselves. If the goal is really an informed electorate, identifying those opposing initiative petitions is just as important as identifying those who support them. This principal was recognized by this Court when it noted, "Knowing which interested parties back or oppose a ballot measure is critical ...." *CPLC I*, 328 F.3d at 1106 (emphasis added); *see also Canyon Ferry*, 556 F.3d at 1032 ("[B]y knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation.") (quoting *Getman*, 328 F.3d at 1106). Yet, WCOG would not require those who oppose initiative petitions to identify themselves to the masses, even when that opposition—as sometimes happens—circulates literature urging the electorate to refuse to sign the initiative petition. Only proponents are forced to identify themselves. When a regulation is underinclusive in this way, it makes belief that it is designed to serve the proffered interest "a challenge to the credulous." *Republican Party of Minnesota*, 536 U.S. at 780. *See also City of LaDue v. Gilleo*, 512 U.S. 43, 52 (1994) (noting that such underinclusiveness diminishes "the credibility of the government's rationale for restricting speech in the first place."). This argument also refutes WCOG's argument that the citizens act as legislators in this context; if they did, the public would have an equal interest in ascertaining those who *don't* support the measure, but the statute does not provide such a mechanism. Moreover, if one accepts WCOG's argument that those signing the petition are acting as legislators and the public should know of their support for thee measure, it follows that the act of signing a petition is *not* a vote for or against the petition, but merely a statement that the citizen-legislator believes that the petition's subject should be proposed to the electorate-legislature as a whole. It is then the full electorate-legislature—i.e., the voting citizens of Washington—who are truly acting as citizen-legislators and voting

similarly problematic in light of *Canyon Ferry*—unless the special interest group is making financial expenditures or contributions, it cannot be divulged under this Court's precedent.

Finally, though the public may have an interest in the names of the petition signers, and, more generally, in governmental openness and disclosure, that interest must bow to the concerns of the Constitution and the rights of citizens to engage in free speech. As the Supreme Court stated, "[i]t is irrelevant that the voters rather than a legislative body enacted [the statute], because the voters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so by enacting legislation." *Citizens Against Rent Control*, 454 U.S. at 295.

E. The District Court did not issue an order on the second count of PMW's Verified Complaint and it is not properly before this Court.

Although the State spends approximately 14 pages discussing the second count of PMW's Verified Complaint, as set forth above, this second count is not properly before the Court at this time. *See* Section II, *supra*; *see also Bernard*, 873 F.2d at 215. Having issued a preliminary injunction on PMW's first count, the District Court did

---

on the subject of the referendum petition. If that is the case, WCOG's logical position must be that the votes of the entire electorate-legislature should be part of the public record and subject to review. However, WCOG does not suggest that the votes at the general election should also be public, as would be necessary to their argument that citizens act as legislators when signing referendum petitions.

not reach the merits of PMW's second claim for relief. (ER016.) In the event the District Court found the Public Records Act constitutional as applied to referendum petitions in general, PMW's second count asked the District Court to issue a preliminary injunction to prevent the release of the names of the signers of Referendum 71, because of the reasonable probability of threats, harassment, and reprisals that would be directed at the signers of the petition if their names were released.[15] However, in the event that this Court determines it wishes to consider PMW's second count, PMW will set forth its arguments as to why a preliminary injunction on the second count is proper, and refute those arguments made by the State.[16]

---

[15] If this Court reaches a decision that a the District Court issued the preliminary injunction on PMW's first count in error, due to the nature of the claims in PMW's second count, it would be imperative for this Court to extend temporary relief preventing the release of the names until such time as the District Court could address whether the claims in PMW's second count merit a preliminary injunction.

[16]Because the District Court did not address PMW's second count, this Court's review of the issue would, by necessity due to a lack of findings at the District Court, be *de novo*, though such a decision would normally be reviewed under an abuse of discretion standard. *Freecycle Network, Inc.*, 505 F.3d at 901. Thus, PMW would have to demonstrate the four requirements for a preliminary injunction, which are (1) PMW's likelihood of success in the underlying dispute between the parties; (2) whether PMW will suffer irreparable injury if the injunction is not issued; (3) the injury to the State if the injunction is issued; and (4) the public interest. *Winter v. Natural Res. Def. Council, Inc.*, ___ U.S. ___, 129 S.Ct. 365, 374 (2008)

1. The Public Records Act is unconstitutional as applied to Referendum 71 because there is a reasonable probability that the release of the names of the petition signers will subject those petition signers to threats, harassment, and reprisals.

The Supreme Court has consistently held that compelled disclosure provisions impose substantial burdens on the First Amendment freedoms of speech and association. *Davis*, 128 S. Ct. at 2774-75 (*citing Buckley*, 424 U.S. at 64). In considering campaign donation thresholds, the Supreme Court predicted that compelled disclosure provisions might chill the speech of some individuals because of the risk that compelled disclosure would expose those individuals to harassment and retaliation. *Buckley*, 424 U.S. at 68; *see also id.* at 237 (Burger, C.J., concurring in part and dissenting in part) (discussing the social costs of public disclosure).

The compelled release of the names on the Referendum 71 petitions is unconstitutional, because there is a reasonable probability that this disclosure will subject the petition signers to a reasonable probability of threats, harassment, and reprisals. Courts analyze these situations under what is referred to as the "reasonable-probability test." Under this test, which was initially articulated by the Supreme Court, when there is a reasonable probability that people espousing a certain opinion—such as supporting traditional marriage—will be subject to threats, harassment, or reprisals, the government cannot compel the release of their names,

as the State seeks to do here. Because the reasonable-probability test is met here, the Public Records Act is unconstitutional as applied and the names of the petition signers should not be released.

a. Disclosing the names of the petition signers will subject those petition signers to a reasonable probability of threats, harassment, and reprisals.

Under the reasonable-probability test, PMW must demonstrate a reasonable probability that the compelled disclosure of the names of those who signed the petition will subject those individuals to threats,[17] harassment,[18] or reprisals.[19] As set forth below, PMW has demonstrated that individuals and organizations circulating the petition have already been subject to threats, harassment, and reprisals, groups have already stated that the release of the names of the petition signers will be used to harass those petition signers, and supporters of similar causes in the past have been

---

[17]"Threat, *n*. 1. A communicated intent to inflict harm or loss on another or on another's property, esp. One that might diminish a person's freedom to act voluntarily or with lawful consent . . . . 2. An indication of an approaching menace . . . . 3. A person or thing that might well cause harm . . . ." Black's Law Dictionary 1489-90 (7th ed. 1999).

[18]"Harassment . . . . Words, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose." Black's Law Dictionary 721 (7th ed. 1999).

[19]"Reprisal . . . . 3. Any act or instance of retaliation, as by an employer against a complaining employee." Black's Law Dictionary 1305 (7th ed. 1999).

subjected to the sort of threats, harassment, and reprisals prior courts have considered and found sufficient to grant disclosure exemptions. Given these facts, there is a reasonable probability that any individual associated with Referendum 71 and/or identified as a result of the State's disclosure of the Referendum 71 petition pursuant to the Public Records Act will be subjected to similar threats, harassment, and reprisals, unless a preliminary injunction is issued to prevent the compelled disclosure of the names.

b. The standards of the reasonable-probability disclosure exemption test.

In *Buckley*, the Supreme Court created the reasonable-probability test in response to, and in rejection of, the argument that the proof of a chill on expressive association would be impossible. *Buckley*, 424 U.S. at 73. In the *Buckley* appellate court, a dissenting opinion argued that a blanket exemption must be created for minor parties, because the "evils of chill and harassment are largely incapable of formal proof." *Id.* (citation omitted). The dissenting judge at the appellate court noted the difficulty of obtaining "witnesses who are too fearful to contribute but not too fearful to testify about their fear." *Id.* at 74. The Supreme Court rejected the dissent's argument by establishing the reasonable-probability test, including its mandate of "sufficient flexibility" in evidence to fit the situation where witnesses would be

difficult to obtain because they are chilled by fear of threats, harassment, or reprisals. *Id*. Rather than create the blanket exemption urged by the appellate court's dissent, the Supreme Court recognized the inherent problem created by the potential for threats, harassment, or reprisals after compelled disclosure (or the possibility of such threats, harassment, or reprisals), and then required only a minimal amount of proof—but some proof, nonetheless—for those requesting an exemption from reporting.

Thus, *Buckley* established the sole test PMW must meet to obtain a disclosure exemption: the Court must determine whether there is a "reasonable probability that the compelled disclosure of a party's contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties." *McConnell*, 540 U.S. at 198 (citation omitted). If there is a such a reasonable probability, PMW must receive an exemption from disclosure. There is no further test or balancing, because the Supreme Court has already done the balancing and established the reasonable-probability test as the sole criterion a party needs to meet to gain a disclosure exemption. *Id*.

c. The quantum and quality of evidence required to meet the reasonable-probability test.

The First Amendment context and the reasonable-probability test govern the

quantum and quality of evidence that must be presented to establish a reasonable probability of threats, harassment, and reprisals. The Supreme Court has set forth five requirements on the quantum and quality of evidence required to meet the reasonable-probability test that are applicable here.

i. Plaintiffs are not required to establish a direct causal link between disclosure and specific instances of threats, harassment, and reprisals.

First, the Supreme Court has rejected the notion that a causal link must be established between the threats, harassment, and reprisals, and public disclosure. *Buckley*, 424 U.S. at 74 ("A strict requirement that chill and harassment be directly attributable to the specific disclosure from which the exemption is sought would make the task even more difficult."). In the present case, the critical question is whether the individuals have been subjected to threats, harassment, or reprisals because of support for Referendum 71 or a traditional definition of marriage.[20] If the answer is "yes," then the Court can assume, as a matter of law, that there is a reasonable probability that any individual who is disclosed because he or she signed the Referendum 71 petition will likewise be subjected to threats, harassment, and

[20]The Second Circuit provides a helpful application of the reasonable-probability test in *FEC v. Hall-Tyner Election Campaign Committee*, in which it, *inter alia*, makes clear that those seeking exemption have no burden to prove "harassment will certainly follow compelled disclosure" because "breathing space" is required in the First Amendment context. 678 F.2d 416, 421 (2d Cir. 1982).

reprisals.

ii. Plaintiffs need not demonstrate that they, or their members, have been subjected to threats, harassment, and reprisals.

Similarly, the "sufficient flexibility" standard of the reasonable-probability test allows an organization to rely not only on evidence of specific incidents of harassment directed at its members or the organization itself, but also on evidence of threats, harassment, or reprisals directed at other individuals and organizations holding similar views. Thus, in *Averill v. City of Seattle*, the court granted an exemption to a specific candidate's campaign committee primarily upon evidence of threats and harassment directed at the Freedom Socialist Party and Radical Women generally. 325 F. Supp. 2d 1173, 1175 (W.D. Wash. 2004). The only additional evidence submitted by the committee consisted of several harassing and crank calls directed at contributors to the committee. *Id.* at 1178.[21] Once PMW has established evidence of threats, harassment, or reprisals directed at other individuals or organizations holding similar views, there is, as a matter of law, a reasonable

[21] In cases where the courts have found it inappropriate to look to evidence of harassment directed at other organizations, they have done so on the grounds that it was impossible to determine the specific cause of the harassment. *See*, *e.g.*, *Oregon Socialist Workers 1974 Campaign Comm. v. Paulus*, 432 F. Supp. 1255, 1259 (D. Or. 1977) (noting that the harassment was "at least as likely to be the product of the other political activities of the affiants."). The evidence presented by PMW leaves little doubt as to the cause of the harassment—each individual was threatened or harassed because he or she supported a traditional definition of marriage.

probability of threats, harassment, and reprisals. The fact that people associated with PMW have been harassed only strengthens the case and demonstrates that the analytical inference is well-justified.

iii. The reasonable-probability test requires only that threats, harassment, and reprisals exist, not that they be severe.

Without citing to any case law, the State asserts that the threats, harassment, and reprisals PMW uses to demonstrate the reasonable probability that the petition signers will be subject to threats, harassment, and reprisals are "insubstantial," and therefore should not be considered as establishing a reasonable probability that the petition signers will be subject to similar threats, harassment, and reprisals if their disclosure is compelled. (State's Brief at 37.) However, the reasonable-probability test does not require threats, harassment, or reprisals to be substantial or severe, only that threats, harassment, and reprisals exist. The test is one of probability, making numerosity a logical criterion. However, the nature of the claim makes it difficult to rely solely on the number of instances of threats, harassment, and reprisals that have occurred. As the Court recognized in *Buckley*, it is a daunting task to find witnesses who are "too fearful to contribute but not too fearful to testify about their fear" when there is a reasonable probability of threats, harassment, or reprisals. 424 U.S. at 74.

Accordingly, the courts must look to a variety of other factors with the

reasonable-probability test. The severity of reprisals has a proper role to play in the analysis, as does when the incidents occurred.[22] So too might the geographic dispersion and publicity surrounding the incidents.[23] However, it is inappropriate to distinguish any case on a single factor. A few severe and public threats could be sufficient to warrant an exemption, while relatively minor instances of threats, harassment, and reprisals may be sufficient if they are widespread. *Averill* recognized that "even small threats" could be sufficient. *Averill*, 325 F. Supp. 2d at 1176.

Thus, with the reasonable-probability test, courts have considered everything from boycotts to death threats to determine whether there is a reasonable probability

---

[22]The evidence presented in this case suggests that the threats, harassment, and reprisals directed at individuals supporting a traditional definition of marriage are not limited to Referendum 71. For example, the declarations in evidence recite many instances of harassment directed at supporters of traditional marriage during and after California's Proposition 8, a ballot measure establishing a Constitutional definition of marriage in California, appeared on the November 2008 ballot. *See* (ER131-256.) In late April, a national controversy erupted when Carrie Prejean, First Runner-Up, Miss USA, said she did not support gay marriage when answering a question from Miss USA judge Perez Hilton. *See Hilton, Miss California Take Sides on "Today"*, S.F. Chronicle, Apr. 23, 2009 (indicating that her answer may have cost her the Miss USA crown). The evidence suggests that the threats and harassment directed at individuals supporting a traditional definition of marriage are anything but isolated incidents.

[23]Incidents involving harassment, threats, and reprisals against supporters of traditional marriage are not geographically limited. (*See* ER330-347(California); ER254-256 (Louisiana); ER281-286 (Michigan); ER292-329 (New York); and ER354-356 (Ohio).)

of future threats, harassment, and reprisals. *See*, *e.g.*, *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 99 (1981) (threatening phone calls and hate mail, the burning of organizational literature, destruction of members' property, police harassment, and shots fired into organization's office); *Bay Area Citizens Against Lawsuit Abuse*, 982 S.W.2d 371 (Tex. 1998) (boycotts). Each has a proper role to play in the analysis and an exemption must be granted if the Court determines that there is a reasonable probability of threats, harassment, and reprisals.

iv. The exemption is not limited to minor political parties nor organized groups.

While *Buckley* and *Brown* make references to "minor parties," nothing in *NAACP v. Alabama*—the opinion on which the exemption is premised—nor much of the subsequent case law, suggests that the exemption is so limited.[24] As the *NAACP v. Alabama* Court put it, compelled disclosure is just as "likely to affect adversely the ability of petitioner and its members to pursue their collective effort to foster beliefs which they admittedly have the right to advocate, in that it may induce members to withdraw from the Association and dissuade others from joining it because of fear of

[24] The "minor party" language in *Buckley* results from an argument asking for a minor party "blanket exemption" from disclosure requirements, which would not have required a demonstration of the requisite level of harm under *NAACP v. Alabama*, 357 U.S. at 449; *see Buckley*, 424 U.S. at 68-74. The *Buckley* Court made no determination that the exemption *only* applied to minor parties, and subsequent decisions make clear that the exemption is not so limited.

exposure of their beliefs shown through their associations and of the consequences of this exposure." 357 U.S. at 462-63.

That the reasonable-probability test is not limited in application to minor parties is confirmed by many cases. In *McConnell v. FEC*, 540 U.S. 93 (2003), the Supreme Court expressly affirmed the analysis and holding of the district court, which applied the reasonable-probability test to entities that were not minor parties. *McConnell v. FEC*, 251 F. Supp. 2d 176, 245-47 (D.D.C. 2003) (applying the reasonable-probability test to a Chamber of Commerce coalition, the American Builders and Contractors, Associated General Contractors of America, the American Civil Liberties Union, and the National Rifle Association). The reasonable probability test has been applied to groups such as abortion providers and Christian groups. *See Am. College of Obstetricians and Gynecologists, Penn. Section v. Thornburgh*, 613 F.Supp. 656, 668 (E.D. Penn. 1985); *Richey v. Tyson*, 120 F.Supp.2d 1298, 1323-24 (S.D. Ala. 2000). The exemption has also been applied in non-partisan elections, which, like ballot measures, are about the issues, not the political party of the candidate. *McArthur v. Smith*, 716 F. Supp. 592, 594 (S.D. Fla. 1989); *see also Oregon Socialist Workers*, 432 F. Supp. at 1257 (noting that courts must be especially vigilant in cases involving minor parties, but in no way limiting the exemption to minor parties).

The exemption is not limited to organized groups, as the State alleges. (State's Brief at 34-35.) It has been applied to abortion providers, and used to extend the protections of a disclosure exemption not just to the specific group of abortion providers who brought suit, but to all abortion providers falling under the challenged disclosure statute. *Am. College of Obstetricians and Gynecologists*, 613 F.Supp. at 668.

Furthermore, "the First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms." *Bellotti*, 435 U.S. at 802 (Burger, J., concurring). As the *Buckley* court put it, age, size, and political success, are all poor factors upon which to create a blanket exemption. *Buckley*, 424 U.S. at 73. The Court explained that some "long-established parties are winners—some are consistent losers," and sometimes a new party "may garner a great deal of support if it can associate itself with an issue that has captured the public's imagination." *Id.* Today's winners might be tomorrow's losers, and the First Amendment must protect both. Tying the reasonable-probability test to minor parties fails to protect the First Amendment's goal of encouraging "uninhibited, robust, and wide-open" debate. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). All parties, whether large or small, new or well-established, winners or losers, must be free to advocate their position free from the deplorable acts directed at supporters of

Referendum 71 and a traditional definition of marriage.

v. The reasonable-probability test does not require any threats, harassment, or reprisals to be directed at supporters of marriage by government officials.

It is of little import that none of the threats, harassment, and reprisals introduced into evidence come directly at the hands of state actors. As the Supreme Court said in *NAACP v. Alabama*, "it is only after the initial exertion of state power represented by the production order that private action takes hold." 357 U.S. at 463. An exemption is warranted from the most well-intentioned disclosure statute if there is a reasonable probability of threats, harassment, and reprisals. *See id.* (noting the deterrent effect of *unintended*, but *inevitable* results flowing from compelled disclosure provisions); *McArthur*, 716 F. Supp. at 594 ("The Court clearly stated that the first amendment prohibits compelled disclosure of contributors or recipients' names if the revelation would subject them to harassment from *either* government officials or private parties. The Court's use of 'either' indicates that harassment, reprisals or threats from private persons is sufficient to allow this court to enforce the plaintiff's first amendment rights by cloaking the contributors and recipients' names in secrecy." (emphasis in original)). Under the First Amendment and the reasonable-probability test, the State cannot stick its head in the sand and ignore the real and inevitable consequences that flow from the PRA, however well-intentioned that

statute may be. In light of these burdens, the State's interest in disclosure of the petition signers must give way to greater First Amendment concerns, to protect the free and robust debate necessary to preserve our form of government.

2. Disclosing the names of the petition signers is unconstitutional as applied to PMW because there is a reasonable probability that disclosure of the names will lead to threats, harassment, and reprisals.

The evidence presented by PMW demonstrates that the State's interpretation of the Public Records Act will expose those who signed the petition to a reasonable probability of threats, harassment, and reprisals if their names are released to the public. The evidence demonstrates that the reprisals directed at supporters of a traditional definition of marriage are not isolated events perpetuated by one or two individuals, but are instead part of a larger campaign designed to silence any individual supporting Referendum 71 or a traditional definition of marriage. In light of such evidence, PMW is entitled to a preliminary injunction, because the right to exercise First Amendment freedoms of expression and association free from threats, harassment, and reprisals outweighs any interest the State may have in compelled disclosure.

At the District Court, PMW set forth numerous instances of threats, harassment, and reprisals leveled against the few people who, at that time, had been

publicly identified as supporters of Referendum 71. Larry Stickney, the Campaign Manager for PMW, has received a large number of threatening and harassing emails from people who disagree with his position on marriage, including emails warning him to avoid entire areas of Washington. (ER470, ¶25.)

Mr. Stickney also received threats to his safety through blog posts, which threatened harm not only to him, but to his entire family as well. (ER470, ¶29.) Mr. Stickney has taken these threats seriously. For example, during the petition circulation process, Mr. Stickney made his children sleep in an interior living room because he feared for their safety if they slept in their own bedrooms. (ER470, ¶27.)

Though few names have been released in Washington of supporters of traditional marriage, those whose names have been released have suffered threats, harassment, and reprisals. Two individuals who serve as pastors had an individual threaten to interrupt their church services, as well as being threatened to have their pictures posted online without their permission. (ER024-028; ER033-037.) Another pastor received a phone call in which the caller expressed an opinion that the pastor would be subject to some sort of retaliatory action for his support of traditional marriage. (ER040-041.)

Moreover, as set forth above, two groups who have requested the names of the petition signers intend to post the names on the internet, and encourage the sort of

"uncomfortable" conversations that would constitute harassment for purposes of the reasonable-probability test, which does not require any laws to be broken for the harassment to be considered.

Unfortunately, anyone who follows the debate over marriage would not be surprised by the harassment and threats that have been leveled at supporters of traditional marriage in Washington. This sort of behavior is commonly directed at supporters of traditional marriage, and past supporters have been subjected to similar—and often worse—threats, harassment, and reprisals for their support. *See* (ER132-465 (consisting of nearly sixty declarations from California, each recounting at least one instance of threats, harassment, and reprisals directed at supporters of Proposition 8, a ballot proposition that added a definition of marriage as between one man and one woman to the California Constitution).)

As set forth above, under the reasonable-probability test, the similar subject matter of the California's Proposition 8 and Referendum 71 allows the Court to consider the threats, harassment, and reprisals directed at supporters of Proposition 8 when determining whether to issue a preliminary injunction in this similar situation.[25] *See Buckley*, 424 U.S. at 74; *Averill*, 325 F. Supp. 2d at 1175.

---

[25]The State asserts that the reliance on declarations submitted in a still-pending California case are misplaced because a preliminary injunction in that case involving compelled disclosure of campaign donors was denied. *ProtectMarriage.com v.*

Supporters of traditional marriage in California were physically assaulted and threatened. An individual participating in a sign-waving event supporting traditional

---

Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) ("*ProtectMarriage.com*"). However, the two cases come before their respective courts at different stages, and that difference makes a preliminary injunction in this case all the more important.

It is important to clarify what was before the California court when it issued its preliminary injunction opinion. The evidence before the California court when it denied the preliminary injunction was extremely limited. Of the fifty-eight declarations now submitted in that case, only nine were before the California court for purposes of its preliminary injunction hearing. (*See* ER132-212.) The remaining declarations were submitted in support of a motion for summary judgment that has been denied without prejudice, to allow time to conduct discovery. (*See* ER044, ¶3; ER213-256.)

Two of the declarations filed after the California court's order denying the preliminary injunction are particularly alarming because they specifically reference the court's order or the disclosure that occurred shortly after the court's order. (*See* ER451 ("The judge released the names today of the donors who supported Prop 8, and your name is on the list as having donated. . . . You're a queer-hating douchebag. Fuck you. Best, Julia"); *see also*, ER448 (discussing harassing phone calls that began shortly after the court's order and the consequent public release of the John Doe's name). The denial of the requested preliminary injunction in that case directly led to the sort of threats, harassment, and reprisals that a preliminary injunction would have protected against.

Furthermore, there are factual and legal differences between the two cases. *ProtectMarriage.com* arose in the similar context of campaign finance disclosure. Those whose rights are at issue in *ProtectMarriage.com* supported a specific campaign financially, as opposed to by signing a petition. The case was brought after the election had ended, after many or most of the names of donors had already been released. Here, the petition signers are taking part in a potential election at the beginning of the process; the release of their names would subject them to a much longer period of time where their names are available and the election is being contested, making the time period in which they are likely to be harassed of a greater length. In *ProtectMarriage.com*, the plaintiffs were asking for relief when most of the damage had already been done; here, the Court stands in the position of being able to prevent that damage before it has a chance to begin.

marriage had an object thrown at her. (ER243.) Another supporter received an email that stated, "I tolerate you because I don't come to where you are and slaughter you." (ER334.)

Supporters of traditional marriage were also harassed and threatened in their own homes. One supporter had the back window of her car broken out while it sat in front of her home. (ER219.) Another supporter's home was egged and floured on multiple occasions. (ER229.) Still another supporter of traditional marriage had a stairway at her home doused in urine. (ER222.) Threats aimed at people in their homes are of particular concern here, where the individuals running the websites that will seek the names of the petition signers will have the addresses of the petition signers. (*See* ER101; 121.)

Exacerbating the problems of the supporters of traditional marriage in California was a lack of response from public officials. A supporter of traditional marriage reported vandalism and theft of materials supporting traditional marriage on three separate occasions to the local police department, yet never once received a response from the police department. (ER385.)

The possibility that such physical harm could be directed at supporters of traditional marriage has chilled the speech of supporters of traditional marriage, and will continue to do so in the future. One father, concerned about the safety of his

children, will no longer speak out publicly in support of traditional marriage. (ER331.) Another supporter of traditional marriage refused to make a public display of her support, because of aggression directed toward her family and friends. (ER376.)

The State attempts to make light of the threats, harassment, and reprisals directed at supporters of traditional marriage in Washington and elsewhere by describing them as "unfortunate" and "simply not comparable" to the threats, harassment, and reprisals directed at others to whom the reasonable probability test has been applied. (State's Brief at 41.) However, as set forth above, the threats, harassment, and reprisals experienced by the supporters of traditional marriage are *exactly* the sort of incidents used by prior courts in applying the reasonable probability test. *Compare Averill*, 325 F.Supp.2d at 1178 (numerous crank phone calls considered in granting exemption) *with* ER207-208 (support of traditional marriage receives harassing calls at work and home, in addition to harassing emails and posts on social networking sites).

Moreover, even if the threats were not of the exact sort experienced in previous situations, the reasonable probability test does not require that PMW set forth a specific type of threats, harassment, or reprisals. Instead, as set forth above, the reasonable probability test requires PMW to set forth those incidents which

supporters of traditional marriage have experienced, then apply the proper test to determine if, based on those incidents, there is a reasonable probability that the release of the names of the petition signers will subject those individuals who are named to threats, harassment, or reprisals.

The evidence of threats, harassment, and reprisals already occurring in Washington, together with the evidence of past threats, harassment, and reprisals directed at supporters of similar causes elsewhere demonstrate that there is a reasonable probability that those who signed the Petition will be subject to threats, harassment, and reprisals, unless this Court prevents the compelled disclosure of the names of the Petition signers through a temporary restraining order and preliminary injunction.

3. PMW meets the remaining preliminary injunction standards.

Having succeeded in showing that they are likely to succeed on the merits of their second count, PMW must demonstrate that they meet the remaining three requirements for the issuance of a preliminary injunction: first, that PMW will suffer irreparable injury if the injunction is not issued, second, the injury to the State if the injunction is issued; and the public interest. *Winter*, 129 S.Ct. at 374.

As to the whether PMW will suffer irreparable harm, "[d]eprivations of speech rights presumptively constitute irreparable harm for purposes of a preliminary

injunction: 'The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury.'" *Summum v. Pleasant Grove City*, 483 F.3d 1044 (10th Cir. 2007) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976); s*ee also Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1234 (9th Cir. 2006) (quoting *Elrod*); *Brown v. Cal. Dept. of Transportation*, 32 F.3d 1217, 1226 (9th Cir. 2003) (noting that a risk of irreparable injury may be presumed when a plaintiff states a colorable First Amendment claim). If the names of the petition signers are disclosed to the public by the State, those petition signers will be denied their First Amendment rights. By compelling the disclosure of the names of the petition signers to the general public, the State would subject those signers to a reasonable probability of threats, harassment, and reprisals, thus chilling the First Amendment rights of the petition signers.

As to the balance of harms, in this Court, "the fact that a case raises serious First Amendment questions compels a finding that there exists the potential for irreparable injury, or that at the very least the balance of hardships tips sharply in [Appellees'] favor." *Sammartano v. First Judicial District Court, in and for County of Carson City*, 303 F.3d 959, 973 (9th Cir. 2002) (internal quotations and citations omitted). This is true even where "the merits of the constitutional claim were not clearly established at this early stage in the litigation." *Id*. (internal quotations and

citations omitted). In the case at bar, however, PMW has firmly established the merits of their constitutional claims. Once the names of the petition signers are released to the groups that have indicated they will be placing the names of the signers on the internet, who plan to contact the petition signers, and encourage the harassment of the petition signers, the First Amendment rights of those who signed the Referendum 71 petition will be violated. When weighing the rights of those seeking the names of the petition signers, who seek the names for curiosity, or to harass and intimidate the petition signers, against the First Amendment rights of the petition signers themselves, the rights of the petition signers must be protected.

Finally, as to whether a preliminary injunction would serve the public interest, this Court has recognized that "it is always in the public interest to prevent the violation of a party's constitutional rights." *Sammartano*, 303 F.3d at 974 (quoting with approval *G & V Lounge, Inc. v. Mich. Liquor Control Com'n*, 23 F.3d 1071, 1079 (6th Cir.1994)). While the public interest in protecting First Amendment liberties has, on occasion, been overcome by "a strong showing of other competing public interests," *Sammartano*, 303 F.3d at 974, there must be *some showing* of an *actual*, strong competing interest in order for a court to find that it is in the public interest to deny injunctive relief. *Id*. In this case, there is no interest—strong or otherwise—which can justify the compelled disclosure of the names of the petition

signers. It is, however, in the public interest that First Amendment freedoms be preserved. The political speech of Plaintiffs will be burdened and chilled if the names of the petition signers are released. Enjoining the offending conduct is the only way to overcome that pernicious effect. Thus, an injunction is in the public interest.

IX. Conclusion

For the reasons set forth above, this Court should uphold the District Court's grant of a preliminary injunction to PMW.

Respectfully submitted this 25th day of September, 2009.

s/ Sarah E. Troupis

James Bopp, Jr. (Ind. Bar No. 2838-84)
Sarah E. Troupis (Wis. Bar No. 1061515)*
Scott F. Bieniek (Ill. Bar No. 6295901)*
BOPP, COLESON & BOSTROM
1 S. Sixth Street
Terre Haute, IN 47807-3510
(812) 232-2434
Attorneys for Plaintiffs/Appellees

Stephen Pidgeon (WSBA #25625)
ATTORNEY AT LAW, P.S.
30002 Colby Avenue, Suite 306
Everett, WA 98201
(360) 805-6677

* Application for Admission Pending

Certificate of Compliance Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 32-1 for Case Numbers 09-35818, 09-35826

I certify that, pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the attached answering brief is proportionately spaced, has a typeface of 14 points or more and contains 13,765 words.

September 25, 2009	s/ Sarah E. Troupis
Date	Counsel for Appellees

Addendum

RCW 29A.68.011

RCW 29A.72.230

RCW 29A.72.240

Wash. Op. Att'y Gen. 378 (1938)

A. Ludlow Kramer, Letter to State Senator Hubert F. Donohue, July 13, 1973

A. Ludlow Kramer, Official Statement, July 13, 1973

Wash. Op. Att'y Gen. 55-57 No. 274 (1956)

Cal. Gov't Code § 6253.5

RCW 29A.68.011
Prevention and correction of election frauds and errors.

Any justice of the supreme court, judge of the court of appeals, or judge of the superior court in the proper county shall, by order, require any person charged with error, wrongful act, or neglect to forthwith correct the error, desist from the wrongful act, or perform the duty and to do as the court orders or to show cause forthwith why the error should not be corrected, the wrongful act desisted from, or the duty or order not performed, whenever it is made to appear to such justice or judge by affidavit of an elector that:

(1) An error or omission has occurred or is about to occur in printing the name of any candidate on official ballots; or

(2) An error other than as provided in subsections (1) and (3) of this section has been committed or is about to be committed in printing the ballots; or

(3) The name of any person has been or is about to be wrongfully placed upon the ballots; or

(4) A wrongful act other than as provided for in subsections (1) and (3) of this section has been performed or is about to be performed by any election officer; or

(5) Any neglect of duty on the part of an election officer other than as provided for in subsections (1) and (3) of this section has occurred or is about to occur; or

(6) An error or omission has occurred or is about to occur in the official certification of the election.

An affidavit of an elector under subsections (1) and (3) of this section when relating to a primary election must be filed with the appropriate court no later than the second Friday following the closing of the filing period for nominations for such office and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsections (1) and (3) of this section when relating to a general election must be filed with the appropriate court no later than three days following the official certification of the primary election returns and shall be heard and finally disposed of by the court not later than five days after the filing thereof. An affidavit of an elector under subsection (6) of this section shall be filed with the appropriate court no later than ten days following the official certification of the election as provided in RCW 29A.60.190, 29A.60.240, or 29A.60.250 or, in the case of a recount, ten days after the official certification of the amended abstract as provided in RCW 29A.64.061.

[2007 c 374 § 3; 2005 c 243 § 22; 2004 c 271 § 182.]

RCW 29A.72.230
Petitions — Verification and canvass of signatures, observers — Statistical sampling — Initiatives to legislature, certification of.

Upon the filing of an initiative or referendum petition, the secretary of state shall proceed to verify and canvass the names of the legal voters on the petition. The verification and canvass of signatures on the petition may be observed by persons representing the advocates and opponents of the proposed measure so long as they make no record of the names, addresses, or other information on the petitions or related records during the verification process except upon the order of the superior court of Thurston county. The secretary of state may limit the number of observers to not less than two on each side, if in his or her opinion, a greater number would cause undue delay or disruption of the verification process. Any such limitation shall apply equally to both sides. The secretary of state may use any statistical sampling techniques for this verification and canvass which have been adopted by rule as provided by chapter 34.05 RCW. No petition will be rejected on the basis of any statistical method employed, and no petition will be accepted on the basis of any statistical method employed if such method indicates that the petition contains fewer than the requisite number of signatures of legal voters. If the secretary of state finds the same name signed to more than one petition, he or she shall reject all but the first such valid signature. For an initiative to the legislature, the secretary of state shall transmit a certified copy of the proposed measure to the legislature at the opening of its session and, as soon as the signatures on the petition have been verified and canvassed, the secretary of state shall send to the legislature a certificate of the facts relating to the filing, verification, and canvass of the petition.

[2003 c 111 § 1823. Prior: 1993 c 368 § 1; 1982 c 116 § 15; 1977 ex.s. c 361 § 105; 1969 ex.s. c 107 § 1; 1965 c 9 § 29.79.200; prior: 1933 c 144 § 1; 1913 c 138 § 15; RRS § 5411. Formerly RCW 29.79.200.]

Notes:

Effective date -- 1993 c 368: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and shall take effect July 1, 1993." [1993 c 368 § 2.]

Effective date -- Severability -- 1977 ex.s. c 361: See notes following RCW 29A.16.040.

RCW 29A.72.240
Petitions to legislature — Count of signatures — Review.

Any citizen dissatisfied with the determination of the secretary of state that an initiative or referendum petition contains or does not contain the requisite number of signatures of legal voters may, within five days after such determination, apply to the superior court of Thurston county for a citation requiring the secretary of state to submit the petition to said court for examination, and for a writ of mandate compelling the certification of the measure and petition, or for an injunction to prevent the certification thereof to the legislature, as the case may be. Such application and all proceedings had thereunder shall take precedence over other cases and shall be speedily heard and determined.

The decision of the superior court granting or refusing to grant the writ of mandate or injunction may be reviewed by the supreme court within five days after the decision of the superior court, and if the supreme court decides that a writ of mandate or injunction, as the case may be, should issue, it shall issue the writ directed to the secretary of state; otherwise, it shall dismiss the proceedings. The clerk of the supreme court shall forthwith notify the secretary of state of the decision of the supreme court.

[2003 c 111 § 1824. Prior: 1988 c 202 § 29; 1965 c 9 § 29.79.210; prior: 1913 c 138 § 17; RRS § 5413. Formerly RCW 29.79.210.]

Notes:

Rules of court: Writ procedure superseded by RAP 2.1(b), 2.2, 18.22.

Severability -- 1988 c 202: See note following RCW 2.24.050.

STATE OF WASHINGTON

Twenty-Fourth Biennial Report

OF THE

ATTORNEY GENERAL

G. W. HAMILTON
Attorney General

1937-1938

OLYMPIA
STATE PRINTING PLANT
1938

You state that so far as you have been able to determine there is nothing in the law which would make such a provision as above quoted against the public policy of the state.

Doubtless you are correct so far as the statute law is concerned, but it cannot be the law that contracts in restraint of marriage are to be upheld. It has long been the law that the public policy of the state is such as will tend to foster and perpetuate the institution of marriage rather than to uphold contracts in restraint of marriage. The law books lay down this principle and it would seem that public officials should not be the first ones to violate the unwritten law of our state.

The provisions of a teacher's contract are prescribed by the department of education of the state and we are of the opinion that the addition of such a provision as the directors in this district have attempted to add thereto comes very close to the line, if it does not cross the line, of being in restraint of marriage.

Inasmuch as the teacher doubtless plans to bring an action if the board attempts to cancel the contract, we will not go further into the matter in this opinion.

13 C. J., section 404 on contracts, cites many authorities upon the question and if you will examine them you will find that quite possibly the court might sustain the teacher's contention.

G. W. HAMILTON, *Attorney General,*
By W. A. TONER, *Asst. Attorney General.*

Initiative and Referendum—Petitions—Inspection by Interested Persons

Olympia, Wash., August 25, 1938.

Honorable Belle Reeves, Secretary of State, Olympia, Washington.

Dear Mrs. Reeves: I am addressing a letter to you upon an oral request of your employee, Mr. Rosenberg, who informs me that you desire to know whether or not the letter written to your office on June 7th is an official ruling of this office.

I wish to inform you that it was only an unofficial letter which did not express the opinion of this office, and the ruling

made in that letter is hereby overruled. A copy of an opinion of this office under date of March 14, 1938, to The Honorable Cliff Yelle, state auditor, is enclosed which discusses the matter more thoroughly as to what constitutes public records in any office.

We find that the letter of June 7th was not thoroughly considered as to whether or not initiatory petitions by the people, when filed in your office, are actually public records.

Since making a thorough investigation and examination of the question, it is very doubtful as to whether such petitions ever become public records.

It is the public policy of this state that we uphold the secret ballot in every particular and these petitions are, more or less, in effect a vote of those who sign the petitions requesting that certain statutes be passed and made the law of the state. This being a fact, we are of the opinion that these petitions are not public records and that your office should refuse to permit them to be inspected and copied.

This being a new question, it should be finally settled by our supreme court and parties desiring to inspect and copy these records can bring an action in the supreme court securing an order for such purpose. The question is very doubtful in my mind and there is no better opportunity than now to have the matter settled by the supreme court.

We would advise that you refuse to allow the petitions to be inspected or copied.

G. W. HAMILTON, *Attorney General.*

Social Security—Unemployment Compensation—What Constitutes Compensation of Employees—Tips Not Included

Olympia, Wash., September 1, 1938.

Mr. Jack E. Bates, Supervisor Unemployment Compensation Division, Olympia, Washington.

Dear Sir: Please be referred to our opinion No. 19 dated September 15, 1937, in answer to the following question:

"Do the terms 'wages' and 'remuneration' as used in the Unemployment Compensation act, chapter 162 of the Laws of 1937, include tips or gratui-

SECRETARY OF STATE STATE OF WASHINGTON

A. LUDLOW KRAMER OLYMPIA 98501

SAM SUMNER REED
ASSISTANT SECRETARY OF STATE

July 13, 1973

The Honorable Hubert F. Donohue
Washington State Senator
Route 2 Box 13
Dayton, Washington 99328

Dear Senator Donohue:

I regret that I must refuse to honor your request for copies of those signature petitions supporting Initiative Measure 282 of Thurston County residents.

I wish to make it clear that during the progress of checking signatures, official proponents or opponents are allowed to be present and this courtesy, of course, would be extended to you. However, once the determination has been made as to whether signatures are sufficient or insufficient, then any names revealed to individuals could not, in my judgment, have any legal value.

As you well know, you are entitled to seek an attorney general's opinion if you so wish, but my position will remain unchanged unless so directed by either the attorney general, the Legislature or the courts.

Sincerely,

A. Ludlow Kramer

ALK/jmw

SECRETARY OF STATE STATE OF WASHINGTON

A. LUDLOW KRAMER OLYMPIA 98504

Secretary of State Lud Kramer denied today a request by State Senator Hubert Donohue (9th district) to release to him the signature of Thurston County residents signing initiative measure 282.

Secretary Kramer's statement reads as follows:

It has been my policy not to release the names of citizens signing initiative or referendum petitions. As far as I am concerned petitions are not public records and are being held in trust by this office.

I consider the signing of an initiative or referendum petition a form of voting by the people. Furthermore, the release of these signatures have no legal value, but could have deep political ramifications to those signing. I will not violate public trust.

Encl: Senator Donohue's letter
reply: Secretary of State Lud Kramer

STATE OF WASHINGTON

DON EASTVOLD
ATTORNEY GENERAL
OLYMPIA

INITIATIVE PETITION SIGNATURES -- PUBLIC NATURE OF

Signatures on initiative and referendum petitions are not public records. The secretary of state should only permit inspection of such petitions by persons authorized to attend the canvass of the names and prosecuting attorneys contemplating criminal prosecutions.

- - - - - - - - - - -

May 28, 1956

Honorable Herb Hanson
State Representative, 39th District
1005 Alice
Snohomish, Washington

Cite as:
AGO 55-57 No. 274

Dear Sir:

In your letter of April 30, 1956, you requested our opinion on the following question:

After the secretary of state has counted the signatures on an initiative petition and found it to be sufficient, are the bound volumes of such signatures public records which should be available for public inspection?

In our opinion to regard such signatures as public records would be contrary to public policy.

ANALYSIS

If the secretary of state refuses to file an initiative or referendum and no successful appeal is taken from such refusal, the secretary of state is required by law to destroy the petition. RCW 29.79.180.

Each voter is required to sign in triplicate a registration card containing his full name and address and listing the precinct in which he is registered. RCW 29.07.090. The third copy of registration cards is filed with the secretary of state

> " * * * for the sole purpose of, checking initiative and referendum petitions and mailing pamphlets required for constitutional amendments and by the initiative and referendum procedure. They shall not be open to public inspection or be used for any other purpose. "(RCW 29.07.130)

Under RCW 29.79.220 the count of signatures on initiative and referendum petitions is made in the same manner as the count of signatures on petitions to the legislature but within sixty days after filing.

RCW 29.79.200 provides in part:

> " Upon filing the volumes of an initiative petition proposing a measure for submission to the legislature at its next regular session, the secretary of state shall forthwith in the presence of at least one person representing the advocates and one person representing the opponents of the proposed measure, should either desire to be present, proceed to canvass and count the names of the registered voters thereon. * * * "

During the count of the signatures representatives of the public are entitled to be present. We are convinced that this provision in the law is designed to satisfy interested persons that there is an accurate canvass of the names appearing on the petitions.

While there is no specific statute on the precise question presented, the above statutes demonstrate, in our view, a tendency on the part of the legislature to regard the signing of an initiative petition as a matter concerning only the individual signers except in so far as necessary to safeguard against abuses of the privilege.

RCW 29.79.240 provides as follows:

> " The secretary of state shall, while making the canvass, keep a record of all names appearing on an initiative or referendum petition which are not registered voters and of all names appearing thereon more than once, and shall report the same to the prosecuting attorneys of the respective counties where the names were signed to the end that prosecutions may be had for such violations of this chapter. "

Willful violations of statutes pertaining to signing of initiative petitions carry penalties ranging from gross misdemeanor to felony. RCW 29.79.440 -- .470. To permit public access to signatures on initiative petitions would tend to hamper the preservation of evidence essential to secure convictions under these sections.

On August 25, 1938, this office advised the secretary of state as follows (OAG 1938, 377):

> " We are of the opinion that these petitions are not public records and that your office should refuse to permit them to be inspected and copied. "

With the exception of representatives of the public entitled to be present during the canvass of the signatures, we reaffirm our previous opinion. We conclude that to regard the names appearing on such petitions as public records for any purpose other than to assure an accurate canvass and to permit prosecuting attorneys to prosecute violations is contrary to public policy.

We hope the foregoing analysis will prove helpful.

Very truly yours,

DON EASTVOLD
Attorney General

Andy G. Engebretsen

ANDY G. ENGEBRETSEN
Assistant Attorney General

AGO 55-57 No. 274

C

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Government Code (Refs & Annos)
Title 1. General
Division 7. Miscellaneous
Chapter 3.5. Inspection of Public Records (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

§ 6253.5. Initiative, referendum, recall petitions, and petitions for reorganization of school districts or community college districts deemed not public records; examination by proponents

Notwithstanding Sections 6252 and 6253, statewide, county, city, and district initiative, referendum, and recall petitions, petitions circulated pursuant to Section 5091 of the Education Code, petitions for the reorganization of school districts submitted pursuant to Article 1 (commencing with Section 35700) of Chapter 4 of Part 21 of the Education Code, petitions for the reorganization of community college districts submitted pursuant to Part 46 (commencing with Section 74000) of the Education Code and all memoranda prepared by the county elections officials in the examination of the petitions indicating which registered voters have signed particular petitions shall not be deemed to be public records and shall not be open to inspection except by the public officer or public employees who have the duty of receiving, examining or preserving the petitions or who are responsible for the preparation of that memoranda and, if the petition is found to be insufficient, by the proponents of the petition and the representatives of the proponents as may be designated by the proponents in writing in order to determine which signatures were disqualified and the reasons therefor. However, the Attorney General, the Secretary of State, the Fair Political Practices Commission, a district attorney, a school district or a community college district attorney, and a city attorney shall be permitted to examine the material upon approval of the appropriate superior court.

If the proponents of a petition are permitted to examine the petition and memoranda, the examination shall commence not later than 21 days after certification of insufficiency.

(a) As used in this section, “petition” shall mean any petition to which a registered voter has affixed his or her signature.

(b) As used in this section “proponents of the petition” means the following:

(1) For statewide initiative and referendum measures, the person or persons who submit a draft of a petition proposing the measure to the Attorney General with a request that he or she prepare a title and summary of the chief purpose and points of the proposed measure.

(2) For other initiative and referenda on measures, the person or persons who publish a notice of intention to circulate petitions, or, where publication is not required, who file petitions with the elections official.

(3) For recall measures, the person or persons defined in Section 343 of the Elections Code.

(4) For petitions circulated pursuant to Section 5091 of the Education Code, the person or persons having charge of the petition who submit the petition to the county superintendent of schools.

(5) For petitions circulated pursuant to Article 1 (commencing with Section 35700) of Chapter 4 of Part 21 of the Education Code, the person or persons designated as chief petitioners under Section 35701 of the Education Code.

(6) For petitions circulated pursuant to Part 46 (commencing with Section 74000) of the Education Code, the person or persons designated as chief petitioners under Sections 74102, 74133, and 74152 of the Education Code.

CREDIT(S)

(Added by Stats.1974, c. 1410, p. 3106, § 10; Stats.1974, c. 1445, p. 3155, § 10. Amended by Stats.1975, c. 678, p. 1483, § 26; Stats.1977, c. 556, p. 1782, § 4; Stats.1980, c. 535, § 1; Stats.1982, c. 163, p. 529, § 2; Stats.1985, c. 1053, § 1; Stats.1992, c. 970 (S.B.1260), § 22; Stats.1994, c. 923 (S.B.1546), § 32.)

HISTORICAL AND STATUTORY NOTES

2008 Main Volume

The two 1974 additions were identical in text, except for the comma between “initiative” and “referendum” in c. 1410.

Section affected by two or more acts at the same session of the legislature, see Government Code § 9605.

The 1975 amendment inserted a comma between “initiative” and “memorandum”.

The 1977 amendment added the proviso at the end of the section authorizing specified officers and entities to examine materials upon court approval.

The 1980 amendment inserted preceding the proviso in the first sentence authority for the proponents to examine insufficient petitions in order to determine which signatures were disqualified and reasons therefor; added the second paragraph relating to examination by proponents of a petition; and added the definition of “proponents of the petition” including subds. (a), (b) and (c).

The 1982 amendment in the first paragraph inserted "and petitions circulated pursuant to Section 5091 of the Education Code" following "referendum, and recall petitions" and inserted "a school district or a community college district attorney" following "a district attorney"; and in the third paragraph defining proponents of the petition added subd. (d) relating to petitions circulated pursuant to Education Code § 5091

The 1985 amendment in the first paragraph inserted "petitions for the reorganization of school districts submitted pursuant to Article 1 (commencing with Section 35700) of Chapter 4 of Part 21 of the Education Code, petitions for the reorganization of community college districts submitted pursuant to Part 46 (commencing with Section 74000) of the Education Code"; and in the third paragraph defining proponents of the petition added subds. (e) and (f) relating to petitions circulated pursuant to Educations Code §§ 35700 and 74000 et seq.

The 1992 amendment inserted the definition of "petition"; and made nonsubstantive changes.

The 1994 amendment made technical and nonsubstantive changes to conform with reorganization of the Elections Code by Stats.1994, c. 920 (S.B.1547).

CROSS REFERENCES

Agendas and other writings distributed for discussion or consideration at public meetings, exemption under this section, see Government Code § 54957.5.
Attorney General, generally, see Government Code § 12500 et seq.
Establishment of the Fair Political Practices Commission, see Government Code § 83100 et seq.
Initiative or referendum petitions, public access, see Elections Code § 17200.
Misuse of initiative, referendum, or recall petition signatures, see Elections Code § 18650.
Personal data, information practices, superseding other provisions of state law, see Civil Code § 1798.70.
Recall, examination of petition signatures in accordance with this section, see Elections Code § 11301.
Recall petitions, public access, see Elections Code § 17400.
School district board members, vacancies, provisional appointment or special election, see Education Code § 5091.

CODE OF REGULATIONS REFERENCES

Administrative hearing procedures for petitions for review of executive officer decisions, records of the State Board, see 17 Cal. Code of Regs. § 60055.9.

Administrative hearing procedures for review of citations, records of the State Board, see 17 Cal. Code of Regs. § 60075.7.

Administrative hearing procedures for review of complaints, records of the State Board, see 17 Cal. Code of Regs. § 60065.9.

Declaratory decision proceeding record, see 1 Cal. Code of Regs. § 1286.

Environmental protection, state delegation, implementation and maintenance of the unified program, see 27 Cal. Code of Regs. § 15180.

Rigid plastic packaging container program, proprietary information, see 14 Cal. Code of Regs. § 17948.

LAW REVIEW AND JOURNAL COMMENTARIES

A proposed amendment to the California public records act: Balancing privacy and public access. Nora Culver, 45 Santa Clara L. Rev. 127 (2004).

LIBRARY REFERENCES

2008 Main Volume

Records 54.
Westlaw Topic No. 326.
C.J.S. Records §§ 99 to 101, 103 to 104.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Administrative Law § 90, Disclosure of Writings Distributed at Meeting.

CA Jur. 3d Administrative Law § 130, Writings Concerning Meetings as Public Records.

CA Jur. 3d Consumer and Borrower Protection Laws § 543, Construction.

CA Jur. 3d Elections § 220, Insufficiency of Petition.

CA Jur. 3d Elections § 223, Preservation; Destruction.

CA Jur. 3d Elections § 320, Misuse of Signatures on Petition; False Affidavits.

CA Jur. 3d Initiative and Referendum § 7, Protection of Petition Signers' Identities.

CA Jur. 3d Records and Recording Laws § 23, Petitions.

West's Ann. Cal. Gov. Code § 6253.5, CA GOVT § 6253.5
Current with urgency legislation through Ch. 156 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., Ch. 26 of the 2009-2010 3rd Ex.Sess., and Ch. 24 of the 2009-2010 4th Ex.Sess., Governor's Reorganization Plan No. 1 of 2009, Prop. 1F, approved at the 5/19/2009 election, and propositions on the 6/8/2010 ballot received as of 9/15/2009

END OF DOCUMENT

9th Circuit Case Number(s) 09-35818, 09-35826

NOTE: To secure your input, you should print the filled-in form to PDF (File > Print > *PDF Printer/Creator*).

****

CERTIFICATE OF SERVICE
When All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) September 25, 2009 .

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Signature (use "s/" format) s/ Sarah E. Troupis

****

CERTIFICATE OF SERVICE
When Not All Case Participants are Registered for the Appellate CM/ECF System

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on (date) .

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed the foregoing document by First-Class Mail, postage prepaid, or have dispatched it to a third party commercial carrier for delivery within 3 calendar days to the following non-CM/ECF participants:

Signature (use "s/" format)